Legacy Org., Inc. v Nomellini

2024 NY Slip Op 33149(U)

September 5, 2024

Supreme Court, New York County

Docket Number: Index No. 650785/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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LEGACY ORGANIZATION, INC., Plaintiff, - v - ALESSANDRO NOMELLINI, Defendant.	
INDEX NO.	650785/2021
MOTION DATE	08/31/2021
MOTION SEQ. NO.	004

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 172, 173, 174, 188, 190, 192, 193, 197, 198, 215, 216, 217, 225
were read on this motion to/for CONTEMPT.

Reference is made to (i) a Decision and Order of this Court, dated December 7, 2021 (the **December 7th 2021 Decision**), (ii) a Decision and Order of this Court, dated December 22, 2021 (the **Supplemental Order**), (iii) a Judgment (the **2022 Judgment**), dated April 8, 2022 , (iv) a Decision and Order of the Appellate Division (the **Appellate Division Decision**), dated November 16, 2023 and (v) a case management order (the **April 2024 Case Management Order**), dated April 9, 2024.

By way of background, this case involves Alessandro Nomellini's alleged fraud of Legacy Organization, Inc. and its shareholders by allegedly falsely representing himself as the sole shareholder of Legacy and filing two false Certificate of Amendment of Incorporation with the Secretary of the State of New York to increase the number of shares of Legacy from 1,000 to 1,000,000 after he had allegedly sold the 1,000 shares to others. When the lawsuit was filed, the Court granted a temporary restraining order (NYSCEF Doc. No. 48) and then a preliminary

injunction (NYSCEF Doc. No. 88) prohibiting Mr. Nomellini from accessing his Legacy email, from holding himself to third parties as the director or sole shareholder of Legacy and otherwise ordered him to produce the Legacy's books and records no later than March 15, 2021 and otherwise indicating that the plaintiff could bring a motion to hold Mr. Nomellini in contempt:

ORDERED that during the pendency of this action, the Defendant is

1. (i) restrained from holding himself out as director, officer or owner of Plaintiff;
2. (ii) restrained from entering into any contracts purportedly on behalf of Plaintiff;
3. (iii) restrained from communicating with third parties, including but not limited to the New York Bureau of Proprietary School Supervision ("BPSS"), Dolce & Gabbana and Trump Organization, Inc., on behalf of, or as a purported representative or agent of, Plaintiff;
4. (iv) restrained from filing any documents with the New York Secretary of State, BPSS or any other governmental agency or organization on behalf of, or as a purported representative or agent of, Plaintiff;
5. (v) restrained from accessing any bank accounts, email accounts, websites or any other online accounts or databases belonging to Plaintiff;
6. (vi) directed to turn over keys, passcodes and/or entry cards to Plaintiff's offices located 725 Fifth Avenue, 19th Floor, New York, NY 10022;
7. (vii) directed to turn over all login and passcode information for any and all bank accounts, email accounts, websites or any other online accounts or databases belonging to Plaintiff;
8. (viii) directed to turn over Plaintiff's BPSS license; and
9. (ix) directed to turn over all books and records belonging to Plaintiff

(NYSCEF Doc. No. 88). Subsequently, it became clear that Mr. Nomellini knowingly, willfully and contumaciously violated the Court's injunction. Indeed, not only did he fail to provide access to Legacy's books and records as he was required to do, but also, he accessed his Legacy

email account and deleted it in its entirety. This was after the lawsuit was filed and after the Court granted the TRO. To be clear, there is no dispute that Mr. Nomellini had access to his Legacy email account. Before the scheduled argument on the TRO, Mr. Nomellini accessed his Legacy email account and communicated to Part 53's Part Clerk that he wanted an adjournment of the hearing (NYSCEF Doc. No. 139). He was well aware that he was not to access his Legacy email account because the Court issued a TRO on the record that day and advised him as such. Nonetheless, afterwards, he intentionally and deliberately violated the Court's order by accessing his email account and deleted his entire email account spoliating its entire contents. Inasmuch as this was intentional, relevance is presumed (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-48, 46 [2015]). Subsequently, the defendant in a March 19th letter (NYSCEF Doc. No. 143) falsely indicated that he deleted his account before the Court issued the TRO. To be clear, there is no doubt whatsoever that this is demonstrably false because he used this email account moments before the TRO hearing to email the Part Clerk to request an adjournment. Although the Court did not make this recitation previously, it is beyond cavil that (i) deliberating deleting his entire email account was "calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding" (*Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 [1st Dept 2001] [internal quotation marks omitted]) and (ii) that this intentional misstatement (NYSCEF Doc. No. 143) violated Rule 130-1.1I(3).

On August 31, 2021, Legacy then moved by OSC to (i) strike Mr. Nomellini's answer pursuant to CPLR 3126 and the common law doctrine of spoliation of evidence based on his deletion of his email account and his violation of the injunctions and (ii) and order of contempt pursuant to Judiciary Law 770, 772 and or 773 ground that Mr. Nomellini knowingly and willfully neglected

to obey the Court's injunction orders. Following the hearing, the Court issued the December 7th 2021 Decision conditionally striking Mr. Nomellini's answer unless he provided the outstanding discovery and access to Legacy's server on or before December 21, 2021. When Mr. Nomellini failed to comply with that order, the Court issued the Supplemental Order striking Mr. Nomellini's answer due to his demonstrated intentional spoliation of evidence and his continued willful disregard of the Court's orders requiring him to produce discovery.

On Appeal, the Appellate Division remanded, holding:

> Order and judgment (one paper), Supreme Court, New York County (Andrew Borrok, J.), entered April 8, 2022, in plaintiff's favor, and bringing up for review orders, same court and Justice, entered on or about December 7, 2021, and December 22, 2021, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to hold defendant in civil contempt and to strike the answer, unanimously modified, on the law and the facts, to vacate the finding of contempt and imposition of a fine, to strike that part of the judgment striking defendant's answer and to reinstate the answer, to remand the matter for further proceedings in accordance with this decision, and otherwise affirmed, without costs. Appeals from aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment and order.
>
> Supreme Court should not have stricken defendant's answer as the record does not establish that plaintiff is "entirely bereft of evidence tending to establish [its] position" (*Zacharius v Kensington Publ. Corp.*, 154 AD3d 450, 451 [1st Dept 2017] [internal quotation marks omitted]). To the extent the documentary evidence is sufficient to establish plaintiff's claims, the information from the deleted email account would not be the sole means for plaintiff to make its case (*see e.g. Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 544 [1st Dept 2013]). Nor has plaintiff established that defendant willfully failed to comply with the court's order to provide outstanding discovery to warrant the drastic relief of striking defendant's answer (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). Accordingly, the matter is remanded for Supreme Court to consider, after affording the parties an opportunity to be heard, such lesser penalty than striking the answer which the court deems just.
>
> Supreme Court also should not have held defendant in civil contempt without making an express recital as to whether defendant's "actions were calculated to or actually did

defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding" (*Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 [1st Dept 2001] [internal quotation marks omitted]). Accordingly, the matter is also remanded for such an express finding. Concur—Renwick, P.J., Kern, Gesmer, Shulman, O'Neill Levy, JJ.

Motion by plaintiff to strike portions of the record, granted to the extent of deeming pages 934-975 of the record stricken

(*Legacy Org., Inc. v Nomellini*, 221 AD3d 487 [1st Dept 2023]; NYSCEF Doc. No. 232).

Following remittuer, the Court issued the April 9, 2024, Case Management Order (NYSCEF Doc. No. 237) indicating:

- Reference is made to a Decision and Order of the Appellate Division (the **Appellate Decision**; NYSCEF Doc. No. 232), modifying prior orders of this Court dated December 7, 2021 (NYSCEF Doc. No. 188) and December 22, 2021 (NYSCEF Doc. No. 193).
- In accordance with the Appellate Decision and in order to afford the parties an opportunity to be heard on the issues of (i) the appropriateness of a penalty lesser than striking the answer and (ii) whether the defendant's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding, the Court shall hold a hearing on these issues on **May 21, 2024, at 2:00 pm**.
- To brief the issues, the parties may each submit an up to 3-page letter, with the movant's letter, if any, to be submitted on or before April 23, 2024. The respondent's letter, if any, shall be submitted on or before May 7, 2024.

Subsequently, the parties submitted letters to the Court. In its submission (NYSCEF Doc. No. 239), Legacy argues that Mr. Nomellini's Legacy email account had a Legacy domain (a.nomellini@legacy.org) and was regularly used by him to conduct Legacy business, and as such requests this Court impose spoliation sanctions in the form of an adverse inference instruction, preclusion and an award of costs, even if Mr. Nomellini's deletion of his email account was merely negligent (*Alphas v Smith*, 170 AD3d 529 [1st Dept 2019]; *See, e.g. RCSUS*

Inc. v SGM Socher, Inc., 214 AD3d 488 [1st Dept 2023]; *Harry Weiss, Inc. v Moskowitz*, 106 AD3d 668 [1st Dept 2013]; *Zacharius v Kensington Publ. Corp.*, 154 AD3d 450 [1st Dept 2017]).

These "lesser penalties," Legacy argues, are also warranted due to Mr. Nomellini's violation of the Injunction Orders by failing to produce Legacy's "books and records" or any of the outstanding discovery by December 21, 2021, and for falsely telling third parties that he was the sole owner/shareholder of Legacy. As such, Legacy also requests that Mr. Nomellini be sanctioned due to his failure to respond to discovery requests (*Siegman v Rosen*, 270 AD2d 14 [1st Dept 2000]).

Finally, with regard to Mr. Nomellini's contempt, Legacy requests that this Court make an express finding that Mr. Nomellini's conduct was "calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies" of Legacy. N.Y. Jud. Law. § 770. To this extent Legacy argues that Mr. Nomellini (i) deleted his entire Legacy email account after the TRO; (ii) falsely held himself out to third parties (i.e. Legacy's former attorneys) as Legacy's sole officer and director; (iii) instructed and encouraged Legacy's former accountant and attorneys not to disclose books and records belonging to Legacy; and (iv) failed to produce company books and records or any discovery (NYSCEF No. 84 at 35; *317 W. 87th Associaties v Dannenberg*, 159 AD2d 245 [1st Dept 1990]).

In his submission (NYSCEF Doc. No. 241), Mr. Nomellini argues that while it is correct that "where the moving party has not been deprived of the ability to establish his or her case or

defense, a less severe sanction is appropriate (*Squillacioti v Ind. Group Home Living Program, Inc.*, 167 AD3d 673, 675 [2d Dept 2018]), it should not be presumed that any penalty is automatically appropriate or warranted:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.,* 93 A.D.3d 33, 45, 939 N.Y.S.2d 321 [1st Dept.2012], quoting *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 220 [S.D.N.Y.2003]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (*see Zubulake,* 220 F.R.D. at 220). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (*see id.*)

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-48, 46 [2015]). Mr. Nomellini asserts that there is no evidence that he "did anything with a calculated purpose or willful intent to avoid exchanging discovery" (NYSCEF Doc. No. 241). In fact, he argues that there is an "absence of any evidence of the permanent destruction of anything" and that Legacy has "full and unfettered access to the online server and related email accounts with usernames and passwords" (*id.*). Notably, Mr. Nomellini alleges that Legacy:

> purposefully sought to exclude Mr. Nomellini from access to Plaintiff and its physical offices thereby providing Plaintiff will full access to all "books and records belonging to Plaintiff." (NYSCEF Doc 48). Mr. Nomellini complied. The "books and records" that Plaintiff demands are, and have been, in Plaintiff's possession. Certainly, they are no longer with Mr. Nomellini. Since the entry of the now-vacated judgment, Plaintiff engaged in barrage of litigation against anyone that may have interacted with Mr. Nomellini no matter how tangential to Plaintiff's pursuit to maliciously harm Mr. Nomellini under the guise of seeking evidence

(*id.*). Mr. Nomellini requests that, in light of the vacatur of the judgment, the discovery schedule should be reset and proceed, possibly with court-appointed supervisor.

With respect to the express recital, Mr. Nomellini reiterates the Appellate Decision, stating:

> the court is required to make "an express recital as to whether defendant's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding" (*Legacy Org., Inc. v Nomellini*, 221 AD3d 487, 488 [1st Dept 2023] [internal citations omitted]). Prior to making any finding and issuing any punishment, a full hearing is necessary: Contempt is a drastic remedy which should not issue absent a clear right to such relief (*Usina Costa Pinto, S.A. v. Sanco Sav. Co.,* 174 A.D.2d 487, 571 N.Y.S.2d 264). To sustain a finding of civil contempt upon a violation of a court order, it must appear with reasonable certainty that the order was knowingly disobeyed (*Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.,* 70 N.Y.2d 233, 519 N.Y.S.2d 539, 513 N.E.2d 706), and if there is any dispute regarding the alleged contemnor's willfulness, a hearing must be held to determine such before the party can be held in contempt (*Usina Costa Pinto, S.A. v. Sanco Sav. Co., supra,* 174 A.D.2d at 488, 571 N.Y.S.2d 264; *Babiarz v. Gasparini,* 198 A.D.2d 608, 603 N.Y.S.2d 915). *(Coronet Capital Co. v Spodek*, 202 AD2d 20, 29 [1st Dept 1994])

(*id.*). To extent that an express recital is required, Mr. Nomellini argues:

> Here, contrary to Plaintiff's persistence, the record does not demonstrate "a clear right to such relief" nor "amply support" that Mr. Nomellini's conduct was "calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party." There is no evidence that anything Mr. Nomellini did or did not do, calculated or otherwise, resulted in "actual damages. The law remains undisturbed for more than a century: "where the amount of damages is not shown," the maximum fine paid to Plaintiff is $250 (assuming Plaintiff's sustains its burden) (*Socialistic Co-operative Pub. Ass'n v Kuhn*, 164 NY 473, 476 [1900])

(*id.*). To this end, Mr. Nomellini requests this Court make an express finding that:

> irrespective of demonstrating a clear right to such relief, the already-paid $5,000 fine is significantly more than the maximum fine of $250. (*Page v Cheung On Mansion, Inc.*, 138 AD2d 324, 325 [1st Dept 1988])

(*id.*). In accordance with the Appellate Division Decision, the Court held a hearing on September 5, 2024. Following the hearing, the Court makes the following findings of fact and imposes the following sanction:

1. As discussed above, Mr. Nomellini deliberately deleted his Legacy email account in its entirety well after a litigation hold was in place. Worse, he did it after the Court issued a TRO preventing him from accessing his email account. Were that not enough, he then lied to the Court indicating that he had deleted the email account prior to the TRO hearing. Now, in accordance with the directive from the Appellate Division, this Court holds Mr. Nomellini in contempt because he acted willfully and contumacious in violating this Court injunction, his conduct was "calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party" (N.Y. Jud. Law. § 770) and his statement that he deleted the Legacy email account before the TRO was issued is demonstrable false. However, in its discretion, as discussed (*tr.* 9.5.24), the Court declines to impose additional monetary sanction beyond the penalty already paid by Mr. Nomellini and the reasonable attorneys' fees, costs and expenses to which Legacy is entitled in bringing its motion (but excluding the letter submission in response to the Appellate Division decision).
2. As to a lesser penalty, Legacy is entitled to an adverse inference at trial. Mr. Nomellini fails to make an adequate showing that any back-up exists to the contents of the intentionally deleted email accounts.
3. Discovery shall proceed as follows:

a. The parties shall serve any outstanding demands no later than September 19, 2024.

b. Responses shall be due no later than October 10, 2024.

c. The parties shall provide a deposition schedule for depositions to occur no later than December 6, 2024 on or before October 10, 2024.

d. Fact discovery shall be closed in this case as of December 9, 2024.

e. NOI: December 17, 2024. Dispositive motions within 30 days of NOI.

f. The parties may revist the schedule should expert discovery be appropriate.

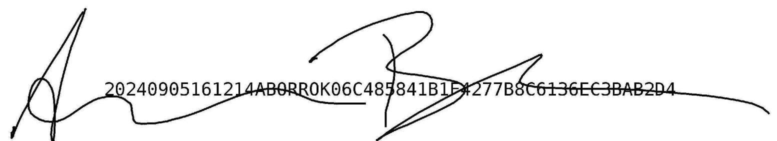
g. Should there be any issues with the foregoing schedule, the parties shall immediately email Part 53 (sfc-part53@nycourts.gov).

4. Legacy shall submit a bill for its reasonable attorneys' fees, costs, and expenses in accordance with the Court's ruling (*tr*. 9.5.25) no later than September 12, 2024.

5. Mr. Nomellini shall either pay such bill or object to the reasonableness of such bill no later than September 19, 2024.

6. If Mr. Nomellini objects, the matter shall be referred to a JHO to hear and determine reasonable attorneys' fees, costs, and expenses.

7. SC: October 10, 2024 @ 2:00 pm. The parties to provide a complete deposition schedule (names/dates).



9/5/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART		☒ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	